No. 86-1429

In the Supreme Court of the United States

OCTOBER TERM, 1986

SECURITIES INDUSTRY ASSOCIATION, PETITIONER

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the banks may act as agents in the private placement of commercial paper.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 807 F.2d 1052. The opinion of the district court (Pet. App. 45a-75a) is reported at 627 F. Supp. 695. The opinion of the Board of Governors of the Federal Reserve System (Pet. App. 77a-111a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1986. The petition for a writ of certiorari was filed on March 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Banking Act of 1933 contains four provisions, usually referred to together as the Glass-Steagall Act (Act), that restrict the participation of banks and bank affiliates in specified securities activities. See *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207, 216 (1984). At issue in this case are two sections of the Act that apply to the activities of banks. Section 16 of the Act, 12 U.S.C. (Supp. III) 24 Seventh, provides in pertinent part that a national bank's business of dealing in securities "shall be limited to purchasing and selling such securities * * * without recourse, solely upon the order, and for the account of, customers, and in no case for [the bank's] own account." Section 16 further provides that a national bank "shall not underwrite any issue of securities * * *." The restrictions in Section 16 of the Act are applicable to state-chartered banks that are members of the Federal Reserve System, as well as to national banks. See 12 U.S.C. 355.

Section 21 of the Act, 12 U.S.C. 378, "also separates investment and commercial banks, but does so from the perspective of investment banks." *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137, 148 (1984). That provision prohibits "any person * * * engaged in the business of issuing, underwriting, selling, or distributing * * * stocks, bonds,

debentures, notes, or other securities" from "receiving deposits" (12 U.S.C. 378(a)(1)). At the same time, Section 21(a)(1) reaffirms the authority of "national banks * * * [to] purchas[e] and sell[] * * * securities * * * to the extent permitted * * * by the provisions of [Section 16 of the Act]."[1]

2. In 1978 Bankers Trust, a state-chartered bank that is a member of the Federal Reserve System, began placing commercial paper for some of its corporate customers.[2] Petitioner, a trade association of securities brokers, underwriters, and investment bankers, petitioned the Board of Governors of the Federal Reserve System (Board) for a ruling that Bankers Trust's activities violate Sections 16 and 21 of the Act. In September 1980 the Board approved Bankers Trust's private placement operation, concluding that the prohibition against underwriting found in Sections 16 and 21 is inapplicable because commercial paper is not a "security" or "other note" within the meaning of the Act. See Pet. App. 235a-256a.

This Court set aside the Board's ruling, holding that commercial paper does in fact "fall[] within the general meaning of the term 'notes' " in Section 21.

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[1] The other two provisions of the Act, Section 20, 12 U.S.C. 377, and Section 32, 12 U.S.C. 78, separately address the securities activities of bank affiliates. See *Board of Governors* v. *Investment Co. Institute*, 450 U.S. 46, 63-64 (1981). Those provisions are not at issue in this case.

[2] Commercial paper refers generally to unsecured, short-term promissory notes issued by commercial entities. Commercial paper is payable to the bearer at a fixed date, typically with a maturity of less than nine months. See generally *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137, 140 n.1 (1984).

Securities Industry Ass'n v. *Board of Governors*, 468 U.S. 137, 149 (1984). Because the Board had based its decision solely on the understanding that commercial paper is not a "security" under the Act, however, the agency had not considered whether Bankers Trust's activities constitute unlawful "underwriting," "distributing," or "selling" within the meaning of Sections 16 and 21. See *Securities Industry Ass'n*, 468 U.S. at 141. The Court therefore "express[ed] no opinion on these matters, leaving them to be decided on remand." *Id.* at 160 n.12.

3. On remand, Bankers Trust provided the Board with a detailed description of its current commercial paper activities, which differ significantly from the activities at issue in *Securities Industry Ass'n* v. *Board of Governors*, *supra*. Under the new placement procedures described by Bankers Trust, the bank advises the issuers of commercial paper about the rates and maturities likely to be accepted in the market, solicits a limited number of institutional purchasers of an issuer's paper, and, acting as agent of the issuer, places the paper with the purchasers. See C.A. App. 113-115. Neither Bankers Trust nor any of its affiliates purchases or repurchases commercial paper placed by the bank (compare *Securities Industry Ass'n*, 468 U.S. at 155), and Bankers Trust no longer extends credit to issuers to cover unsold portions of the paper (see C.A. App. 113-119; compare *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137 (1984)).

On June 4, 1985, the Board ruled that Bankers Trust's placement of commercial paper is not unlawful "selling," "underwriting," or "distributing" within the meaning of the Act (Pet. App. 77a-111a). The Board first determined that the bank's activities are expressly authorized by Section 16 of the Act, which

permits a bank to sell securities "without recourse, solely upon the order, and for the account of, customers, and in no case for [the bank's] own account." The Board reasoned that Bankers Trust does not purchase or sell commercial paper for its own account, since it neither purchases the paper itself nor extends credit to the issuer. See Pet. App. 84a-85a. The Board also found that Bankers Trust places the paper "without recourse" because the bank does not enter into a repurchase agreement, endorsement, or other guarantee arrangement with the purchaser (see *id.* at 86a-87a). Finally, the Board found that the bank places the commercial paper only on the order of customers, because it is the issuer of the paper that decides whether and how much paper to sell (see *id.* at 87a-88a).

The Board next concluded that the bank's activities did not constitute "underwriting" or "distributing" under the Act (see Pet. App. 91a-99a). While the Act nowhere defines these terms, the Board concluded that as commonly used "underwriting" and "distributing" refer only to the offering of securities to the general public (see *id.* at 91a-92a). The Board found further support for this conclusion in the Securities Act of 1933 (Securities Act), 15 U.S.C. 77a *et seq.*, which treats the terms "underwriting" and "distributing" as "substantially synonymous with a public offering of securities" (*id.* at 93a (footnote omitted)). And here, the Board found that Bankers Trust neither offers nor advertises to the general public the paper that it places (*id.* at 96a-99a).

After finding that Bankers Trust's private placement of commercial paper was permitted by the plain language of the Act, the Board concluded that the bank's activities did not carry any of the potential

risks or conflicts of interest that Congress sought to prevent when it separated commercial from investment banking. The Board noted (Pet. App. 101a-103a) that Bankers Trust would neither purchase commercial paper for its own account nor extend credit to finance its purchase. The Board also explained that, after an "exhaustive[] review[] [of] the activities of banks in privately placing [securities]," neither it nor the other banking agencies had found any "empirical evidence that these activities resulted in harm to the bank or conflicts of interest" (*ibid.*; see also *id.* at 104a, 105a, 106a). Finally, the Board found no risk that Bankers Trust would offer loans to issuers to make the paper more attractive to purchasers (*id.* at 104a),[3] or that there would be any "investor or depositor loss of confidence in the bank simply because [the bank] acted as agent in the sale of commercial paper" (*id.* at 105a).

4. Petitioner sought review of the Board's decision in the United States District Court for the District of Columbia, which held that Bankers Trust's activities constituted prohibited underwriting and distributing under the Act (Pet. App. 45a-75a). The court did not disagree with the Board's conclusion that these terms, not defined by the statute, ordinarily are understood to encompass only the public offering of securities (see *id.* at 67a). But the court concluded that the Securities Act contains a specific exemption for an underwriting that is not a public offering; finding no similar exemption for a "non-

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[3] The Board noted that the payment received by the bank for its placement services is quite small in relation to the size of the loan that would be needed to shore up an issuer's paper (Pet. App. 104a).

public underwriting" in the Glass-Steagall Act, the court held that Congress did not intend to so limit the term "underwriting" in the Act (see *id.* at 69a-70a).

The court of appeals reversed (Pet. App. 1a-31a). The court first concluded that Bankers Trust's activities fit within the permissive phrase of Section 16 (see *id.* at 11a-17a). And the court then held that the Board reasonably interpreted the statutory term "underwriting" to apply only to public offerings of securities. Noting that the Act nowhere defines the term "underwriting," the court reasoned that the Board's interpretation is supported by "congressional intent embodied in contemporaneous securities legislation," and is "reasonably relate[d] to the concerns that the * * * Act sought to meet." *Id.* at 18a. The court of appeals added that this Court's prior opinion in this case "made it very plain that the meaning of a term in other legislation passed roughly at the same time as the Glass-Steagall Act * * * provided 'considerable evidence' of the 'ordinary meaning' Congress attached to the same term in the Glass-Steagall Act itself" (Pet. App. 18a-19a (quoting *Securities Industry Ass'n*, 468 U.S. at 150)). And just as this Court in *Securities Industry Ass'n*, 468 U.S. at 150, relied on the Securities Act for guidance in interpreting the term "note," the court of appeals turned to the Securities Act for help in defining "underwriting."

Undertaking this inquiry, the court concluded that the text and legislative history of the Securities Act demonstrate a congressional understanding that "the concept of underwriting * * * connote[s] involvement in a public offering of securities" (Pet. App. 20a). The court of appeals also found that the district court erred in relying on the Securities Act's exemption for

nonpublic offerings, reasoning that the legislative history of the exemption actually supports the Board's view by making it clear that Congress viewed underwriting as synonymous with the public offering of securities (see *id.* at 20a-21a).[4]

ARGUMENT

In its prior ruling in this case the Court held that commercial paper is a "note" within the meaning of the Glass-Steagall Act. *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137 (1984). But the Court specifically "express[ed] no opinion" on the issue here: whether Bankers Trust's activities constitute "underwriting" or "distributing" under Sections 16 and 21 of the Act. The Court left that question open "to be decided on remand" (468 U.S. at 160 n.12). The Board and the court of appeals have now answered that question in a manner that is wholly consistent with the Court's prior decision in this case. Because the decision below plainly is cor-

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[4] The court also endorsed the Board's conclusion that Bankers Trust's private placement activities do not create "subtle hazards" or conflicts of interest. The court initially noted that the "most obvious hazard reached by the Act—the investment of bank funds in speculative securities—is not at issue," since Bankers Trust neither purchases paper for its own account nor makes loans to the issuer when the paper is not sold. See Pet. App. 27a. The Board's conclusion that no other risks were present, the court continued, was "precisely the kind of exercise of delegated expertise that deserves our full deference" (*id.* at 29a). Therefore, the court held, "the Board reasonably concluded not only that Bankers Trust's placements of commercial paper meet the literal requirements of section 16, but also that those placements are consistent with the panoply of the Act's purposes" (*id.* at 31a).

rect—and because it is the first by an appellate court to decide the issue presented—further review is not warranted.

1. a. Section 16 of the Act allows a bank to engage in the "business of dealing in securities * * * limited to purchasing and selling such securities * * * without recourse, solely upon the order, and for the account of, customers, and in no case for [the bank's] own account." The court of appeals correctly held that Bankers Trust's activities fall squarely within this permissive language. Those activities involve the bank's solicitation as agent of a limited number of purchasers for an issuer's commercial paper, conduct that certainly constitutes "selling" within the ordinary meaning of the term. Cf. *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207, 219-221 & n.20 (1984); *Securities Industry Ass'n* v. *Comptroller of the Currency*, 577 F. Supp. 252, 254-257 (D.D.C. 1983), aff'd, 758 F.2d 739 (D.C. Cir. 1985), cert. denied, No. 85-392 (Jan. 13, 1986). The bank does not purchase or repurchase any of the commercial paper that it places (Pet. App. 27a, 100a-101a), or make loans that are in any way related to its commercial paper placement service. The bank thus functions solely as an agent, the precise activity permitted by Section 16. See *Securities Industry Ass'n*, 468 U.S. at 218-219 & n.20 (footnote omitted) (brokerage activity is permitted by Sections 16 and 20 because "a broker executes orders for the purchase or sale of securities solely as agent"); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 638 (1971).

Similarly, Bankers Trust does not enter into any repurchase agreement, endorsement, or other guarantee arrangement with respect to the commercial paper that it places (see Pet. App. 86a). Its private place-

ment activities thus plainly are "without recourse." See *Awotin* v. *Atlas Exchange Nat'l Bank*, 295 U.S. 209, 212 (1935); *Securities Industry Ass'n* v. *Comptroller of the Currency*, 577 F. Supp. 252, 256-257 (D.D.C. 1983), aff'd, 758 F.2d 739 (D.C. Cir. 1985), cert. denied, No. 85-392 (Jan. 13, 1986). And the bank's client—not the bank—decides whether, in what amount, and at what price the paper should be issued (see Pet. App. 15a-16a, 87a-88a). The bank therefore places the commercial paper solely upon the order and for the account of the issuer, its customer.

b. Against this background, petitioner argues (Pet. 14-15) that the bank's activities fall outside the permissive phrase in Section 16 because the "business of dealing in securities" authorized by Section 16 is limited to trading in the secondary, rather than the primary, securities market. This contention is without merit. Nothing in the ordinary meaning of the phrase "the business of dealing" suggests a distinction between primary and secondary market activities. To the contrary, that phrase is universally understood in the context of the securities laws to *include* primary market activity. Thus, Section 2(12) of the Securities Act, 15 U.S.C. 77b(12), defines a "dealer" as "any person who engages * * * as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person." This broad definition plainly includes persons who engage in the business of selling securities in the primary market. Indeed, firms that engage in no business other than underwriting or distributing new issues of securities —primary market activities—are understood to be broker-dealers under the federal securities laws. See SEC, *Report of Special Study of the Securities Markets*, H.R. Doc. 95, 88th Cong., 1st Sess. Pt. 1,

at 17, 32 (1963). This Court has thus recognized that the term "dealer" is used to describe activity in the primary market. See *Securities Industry Ass'n*, 468 U.S. at 218 n.18.[5]

c. Petitioner fares no better with its reliance (Pet. 16) on the sparse legislative history of Section 16. The congressional committee reports state simply that the provision's permissive phrase permits banks "to purchase and sell investment securities for their customers to the same extent as heretofore, but hereafter they are to be authorized to purchase and sell securities for their own account only under such limitations * * * as the Comptroller of the Currency may prescribe." S. Rep. 77, 73d Cong., 1st Sess. 16 (1933). Petitioner seems to argue that the reference to activities conducted "heretofore" means that the only permissible securities activities are those that were in fact conducted by banks prior to the enactment of Section 16. As both courts below concluded, however, Bankers Trust's commercial paper activities are plainly authorized by the language of Section 16. In these circumstances, it was hardly necessary for "Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute" (*Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980)). See also *Sedima, S.P.R.L.*

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[5] Petitioner's reliance (Pet. 15) on *Securities Industry Ass'n*, 468 U.S. at 219, to support its primary/secondary market distinction is misplaced. The Court did state that the permissive phrase in Section 16 includes discount brokerage, a secondary market activity. But nothing in the Court's opinion suggests that it meant to limit the "business of dealing" language in Section 16 *only* to secondary market activity. Indeed, the Court's use of the word "dealer" in its opinion (468 U.S. at 218 n.18) to include primary market activity refutes petitioner's claim to that effect.

v. *Imprex Co.*, No. 84-648 (July 1, 1985), slip op. 16 n.13.

In any event, there is little doubt that banks *did* act as agents in private placements at the time of the enactment of the Glass-Steagall Act. Agency placement of securities was well-established when the Act was passed. See SEC, *Privately-Placed Securities—Cost of Flotation* 2 (1952). Given the wide range of securities services offered by banks at the time (see *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 18-19), it would be most surprising to find that banks did not participate in private placements—a conclusion that is confirmed by the fact that banks were privately placing commercial paper shortly after the enactment of the Act. See *Proposed Amendments to the Securities Act of 1933 and to the Securities Act of 1934: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 77th Cong., 1st Sess. 527-548 (1941).[6]

2. Petitioner's further argument that Bankers Trust's private placement of commercial paper is a prohibited "underwriting" is equally without merit. While the term "underwriting" is nowhere defined in the Act, the Court has held repeatedly that such " 'silence compels us to "start with the assumption that

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[6] Petitioner takes out of context (Pet. 16) this Court's statement during its prior consideration of this case that there is no evidence that, in the past, banks sought to underwrite commercial paper. See *Securities Industry Ass'n*, 468 U.S. at 160. The Court made that statement in the context of the ruling before it, which permitted a bank to effectively purchase paper for the bank's own account. Since it was only after remand that Bankers Trust began to privately place commercial paper as agent, the Court's prior statements could not have been directed to the private placement activities now at issue.

the legislative purpose is expressed by the ordinary meaning of the words used.'" *Securities Industry Ass'n*, 468 U.S. at 149 (quoting *Russello* v. *United States*, 464 U.S. 16, 21 (1983)). And the term "underwriting" is ordinarily used to describe an offering of securities to the public. See *Securities Industry Ass'n*, 468 U.S. at 217-218 n.17; L. Loss, *Securities Regulation* 551 (2d ed. 1961). Petitioner does not challenge this conclusion; even the district court, which ruled for petitioner, agreed that underwriting "commonly refers to the distribution of securities to the public." Pet. App. 67a.[7]

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[7] In 1977 the Board determined that a bank that engages in a private placement as agent is not underwriting under Sections 16 and 21 of the Act. See Federal Reserve Board Staff, *Commercial Bank Private Placement Activities* 81-99 (1977). And in 1978 the other bank regulatory agencies joined the Board in its interpretation. See Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve Board, *Commercial Bank Private Placement Activities* (1978). These rulings were issued at the express request of Congress. See Federal Reserve Board Staff Study, *supra*, App. A. Congress has never modified or rejected the Board's interpretation in subsequent amendments to Section 16. In these circumstances, it should be assumed that the Board has correctly discerned legislative intent. See *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 11 n.7; *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978). And petitioner's claim (Pet. 18) that the Board's ruling conflicts with its prior analysis is wrong. The Board's prior decision in *First Arabian Corp.*, 63 Fed. Res. Bull. 66 (1976) (cited by petitioner at Pet. 18 n.19), did not purport to interpret Sections 16 and 21. In any event, the Board's 1977 Study specifically rejected the result in *First Arabian*, a course the Board was free to follow. See *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967).

That understanding of the term is confirmed by the definition of "underwriting" found in the Securities Act. Section 2(11) of the Securities Act defines an "underwriter" as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security." 15 U.S.C. 77b(11). Under this definition, a seller "underwrites" when he sells an issuer's securities in a "distribution." And from the time of the enactment of the Securities Act, it has been understood that a "distribution," and thus an "underwriting," can occur only with a public offering of securities. See H.R. Conf. Rep. 1838, 73d Cong., 2d Sess. 41 (1934) ("there can be no underwriter within the meaning of the [A]ct in the absence of a public offer"); *Woolf* v. *S.D. Cohn & Co.*, 515 F.2d 591, 613 (5th Cir. 1975), vacated on other grounds, 426 U.S. 944 (1976); *Vohs* v. *Dickson*, 495 F.2d 607, 620 (5th Cir. 1974); *Gilligan, Will & Co.* v. *SEC*, 267 F.2d 461, 466 (2d Cir.), cert. denied, 361 U.S. 896 (1959); *Neuwirth Investment Fund* v. *Swanton*, 422 F. Supp. 1187, 1194-1195 (S.D.N.Y. 1975). As Professor Loss has explained:

> Nor is a person an underwriter who buys securities from an issuer with a view to reoffering them to a small number of persons for investment, or who on the issuer's behalf sells securities to a small number of persons for investment. There must be a contemplated "distribution"—a term which the Commission regards as more or less synonymous with "public offering."

L. Loss, *Securities Regulation* 551 (2d ed. 1961) (footnote omitted). Thus, "even a professional investment banker is *not* a statutory underwriter * * * in arranging a private placement on behalf of the issuer." *Id.* at 547 (emphasis in original).

Petitioner nevertheless argues (Pet. 16-17) that, because the securities laws and the Glass-Steagall Act serve different purposes, the securities laws do not provide guidance on the meaning of the term "underwriting" as it is used in the Glass-Steagall Act. This claim is specious. In its prior ruling in this very case, the Court specifically looked to the Securities Act for help in determining the meaning of terms in the Glass-Steagall act, explaining that the Glass-Steagall Act was "one of several pieces of legislation collectively designed to restore public confidence in financial markets" (468 U.S. at 150-151). The Securities Act thus provides "considerable evidence" (*id.* at 150) as to the meaning of words used in the Glass-Steagall Act.[8]

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[8] Petitioner also attempts to characterize (Pet. 16) the court of appeals' holding as "reading into" the Glass-Steagall Act the Securities Act's registration exemption for private offerings. But this argument misstates both the holding below and the meaning of the Securities Act. The evident premise of petitioner's argument—that the Securities Act has an explicit exemption for non-public "distributions" or non-public "underwritings" that the Board and the court of appeals carried over to the Glass-Steagall Act—is simply wrong. The Securities Act does not distinguish between public and non-public distributions or underwritings; it distinguishes between public and non-public transactions by "issuers." Under the Securities Act, it is unlawful to "sell," "offer to sell," or "offer to buy" a security in interstate commerce unless a registration statement has been filed. See 15 U.S.C. 77e. The Act exempts from this provision "transactions by an *issuer* not involving any public offering." 15 U.S.C. 77d(2) (emphasis added). Thus, nothing in the Securities Act recognizes any such thing as "a non-public distribution" or a "non-public underwriting." Indeed, the legislative history of the private offering exemption confirms that Congress understood underwriting to involve only public offerings. When originally in-

3. None of petitioner's other arguments has merit:

a. Petitioner's contention (Pet. 11-12) that the Board has substituted a "regulatory approach" for the "flat prohibitions" in the Act misstates both the substance of the Board's decision and the meaning of the statute. However "flat" the Act's prohibitions may be, they are neither self-executing nor self-defining; in every case, there must be a determination whether the activity at issue falls within those prohibitions. See *Securities Industry Ass'n*, 468 U.S. at 218-221 (upholding Board's interpretation of the Act to allow bank holding company acquisition of a discount brokerage affiliate); *Investment Co. Institute*, 450 U.S. at 65-68 (upholding Board's interpretation of the Act to allow an affiliate of a bank holding company to act as an investment adviser to a closed-end mutual fund). And it is the role of the Board—the agency with the "primary responsibility for implementing the Glass-Steagall Act" (*Securities Industry Ass'n*, 468 U.S. at 217; see *Board of Governors* v. *Investment Co. Institute*, 450 U.S. 46, 68 (1981))—to make that determination. As with any other administrative agency, the Board's ruling must

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troduced in 1933, the exemption covered "transactions by an issuer not with or through an underwriter." See H.R. 5480, 73d Cong., 1st Sess. § 4(1) (1933). In committee the phrase "and not involving any public offering" was added to this language. See H.R. Rep. 85, 73d Cong., 1st Sess. 1 (1933). It was clear even at the time, however, that "there can be no underwriter within the meaning of the act in the absence of a public offer." H.R. Conf. Rep. 1838, 73d Cong., 2d Sess. 41 (1934). The very next year Congress confirmed this proposition by eliminating as "superfluous" that part of the exemption for transactions "not with or through an underwriter." Securities Exchange Act of 1934, ch. 404, § 203(a)(1), 48 Stat. 906. See L. Loss, *supra*, at 551 & n.307.

be measured against the "plain language of the statute and its legislative history" (*Securities Industry Ass'n*, 468 U.S. at 221). And where, as here, the Board's ruling is faithful to these sources, it "deserves the deference normally accorded the Board's construction of the banking laws" (*ibid.*). See *Investment Co. Institute*, 450 U.S. at 68.

b. For similar reasons, petitioner is incorrect in arguing (Pet. 22-23) that the Board's analysis of the potential hazards of the private placement of commercial paper is somehow inconsistent with the Court's prior ruling in this case. Petitioner apparently reads *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 137 (1984), to prohibit the Board from considering whether proposed securities activities will raise any of the particular concerns addressed by the Act (see Pet. 24). If this is petitioner's contention, it misreads both the Court's prior decision in this case and the Court's other decisions construing the Act. This Court's cases make clear that where a given activity is barred by the language of the statute, the Board cannot authorize that activity by finding that it fails to present any of the dangers addresed by the Act. See *Securities Industry Ass'n*, 468 U.S. at 140, 152; *Investment Co. Institute*, 401 U.S. at 625. But the Court's cases make it equally clear that where a given activity is *authorized* by the plain language of the Act, the Board nevertheless may consider whether permitting it in a given case would be consistent with the Act's purposes. See *Securities Industry Ass'n*, 468 U.S. at 220-221; *Investment Co. Institute*, 450 U.S. at 67-68. See *Securities Industry Ass'n*, 468 U.S. at 220-221.[9]

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[9] Petitioner's attempt to create the impression that Congress disapproves of the Board's ruling is misleading. The

c. Finally, petitioner grossly overstates the practical significance of the ruling below. The Board's decision does not allow banks to market everything from "junk bonds to speculative stocks" (Pet. 10); it is limited to dealings in commercial paper (see Pet. App. 109a). The Board has authorized Bankers Trust to engage in no other securities-related activities. And the Board's empirical studies show that banks, which have been offering private placements for some time, have not engaged in unduly risky activities. See note 7, *supra*.

Petitioner also is mistaken in suggesting (Pet. 12) that the ruling below will be the basis for wide-scale underwriting by banks. While petitioner attempts (*ibid.*) to relate this case to Board proceedings concerning the authority of bank *affiliates* to engage in underwriting, the underwriting activities of those affiliates are in fact governed by provisions of the Act wholly different from those at issue in this case. See note 1, *supra*. Indeed, the Act expressly allows banks affiliates to engage in a certain level of underwriting. Compare 12 U.S.C. (Supp. III) 24 Seventh, 378(a)(1) (banks may not engage in underwriting) with 12 U.S.C. 78, 377 (emphasis added) (member banks may not be affiliated with firms "*engaged principally* in * * * underwriting"). As this Court has recognized, the application of the Act to bank affiliates thus raises issues far different from its application to banks. See *Investment Co. Institute*, 450 U.S. at 58-59 n.24, 60-61 n.26; *Board of Governors* v. *Agnew*, 329 U.S. 441 (1947).

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letter from Senator Proxmire to Chairman Volcker cited by petitioner (Pet. 12 & n.4) deals with bank underwriting, rather than with private placements where the bank acts only as an agent.

Since the court of appeals decided this case, the Board has issued a series of orders under Sections 20 and 21 of the Act that allow bank holding companies, through their affiliates, to underwrite commercial paper as a principal, provided the affiliates are not engaged principally in such activity. See *Chase Manhattan Corp.*, [Current] Fed. Banking L. Rep. (CCH) ¶ 86,912 (Mar. 18, 1987); *Citicorp*, [Current] Fed. Banking L. Rep. (CCH) ¶ 86,597 (Apr. 30, 1987); *Citicorp*, Order of May 18, 1987. And in another ruling issued after the court of appeals' decision here, the Board authorized Bankers Trust to undertake its private placement activities through an affiliate of the bank's holding company on the alternative ground that, even if the placement activity is assumed to constitute "underwriting," the affiliate would not be engaged principally in that activity. See *Bankers Trust New York Corp.*, 73 Fed. Res. Bull. 138 (1987). Thus, the activities petitioner challenges as violations of Sections 16 and 21 of the Act will in all probability be carried on by Bankers Trust and other banking organizations through affiliates, a development that would rob the decision below of any practical importance.

Petitioner has sought review in the various courts of appeals of these recent Board orders regulating affiliate activities. See *Securities Industry Ass'n* v. *Board of Governors*, No. 87-4041 (2d Cir.); *Securities Industry Ass'n* v. *Board of Governors*, No. 87-1169 (D.C. Cir.); *Securities Industry Ass'n* v. *Board of Governors*, No. 87-1030 (D.C. Cir.) If these Board orders are set aside and banks continue to seek to carry on their private placements of commercial paper directly rather than through affiliates, petitioner will be free to challenge such activities at

that time. At present, however, absent a conflict in the circuits, review of the decision below is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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